

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.164 OF 2005

Sau.Sangita Sunil Bhardiya,
Age : 25 years, Occupation:
Household, resident of 1551/7A/2, ...Applicant
Barshi, District Solapur. (Ori.Defendant)

Versus

Rajendra Babulal Sarnot,
Age : 36 years, Occupation:
Trade, resident of 2557, Near
Chitra Talkies, Jamgaon Road,
Barshi, Taluka Barshi, ...Respondent
District Solapur. (Ori.Plaintiff)

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Mr.M.S.Karnik with Ms.Pritam Tendulkar for Applicant.

Mr.A.V.Anturkar with Mr.S.B.Deshmukh for Respondent.

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CORAM: A.M.KHANWILKAR, J.

SEPTEMBER 25, 2006.

ORAL ORDER :

1. Rule. Mr.Anturkar waives notice for Respondent.

2. As short question arises, in terms of order dated March 31, 2006, Revision was heard for final disposal by consent of the parties. Both

Counsel were heard at length.

3. This Revision Application under Section 115 of the Civil Procedure Code, 1908 (hereinafter referred to as 'the Code') is directed against Judgment and Decree passed by the Civil Judge, Senior Division, Barshi dated November 18, 2005 in Special Civil Suit No.35 of 2002 (Old No.Spl.C.S.No.402/1997). The Respondent had filed Suit against the Applicant under Section 6 of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') for possession of the house property bearing CTS No.2557 situated within the boundaries of Barshi Municipal Corporation, District Solapur admeasuring about 89.21 square meters on the assertion that the Respondent/Plaintiff had agreed to purchase the said property from the original owner for consideration and the Respondent was put in possession of the said property pursuant to the Agreement dated 19th September 1994; whereas, the Applicant/Defendant forcibly dispossessed him (Plaintiff) from the suit premises on 1st March 1997. The Suit came to be filed on 18th June 1997 which is within six months from the date of alleged

dispossession of the Plaintiff from the suit property. In substance, the claim of the Respondent/Plaintiff was founded on the Agreement dated 19th September 1994 executed in his favour by the original owner, coupled with the fact that the Plaintiff was put in possession of the said property and was in possession thereof and continued to be in possession till relevant time. To establish the factum of possession of the suit property, Plaintiff relied on documentary evidence such as Shop Act licence, photographs, etc. The Applicant/Defendant on the other hand, claimed that the document executed in favour of Plaintiff dated 19th September 1994 was of no avail. In the first place, that document was purportedly executed in favour of the Plaintiff by Smt.Parvatibai Godane, successor of Ravishankar Bhagwat Godane on behalf of two minors without prior permission. In any case, the said document was cancelled on 7th July 1995 and Agreement in that behalf was executed between Smt.Parvatibai Godane and the Plaintiff.

4. It is the case of the Defendant that after the Agreement of 7th July 1995 which is duly signed

by the Plaintiff, the Plaintiff had no concern with the suit property. Here it may be mentioned that the Agreement relied upon by the Plaintiff dated 19th September 1994 is an unregistered Agreement. It is asserted by the Applicant/Defendant that Smt.Parvatibai Godane executed Agreement of Sale in favour of Mr.Ajitkumar Surpuriya on 9th September 1995 (Exhibit 163). The said Mr.Ajitkumar Surpuriya is none other than the brother-in-law of the Plaintiff. According to the Defendant, the Plaintiff is one of the signatory to the Agreement (Exhibit 163). The Defendant has then relied on another document executed by Smt.Parvatibai Godane being "registered Sale Deed" in favour of said Ajitkumar Surpuriya dated 11th October 1995 (Exhibit 164). This Sale Deed executed in favour of Surpuriya by original owner Godane for herself and on behalf of the minors, was after permission to dispose off the property was granted by the competent Court (i.e. 31st August, 1995). The document clearly mentions the nature of transaction in favour of said Ajitkumar Surpuriya and the fact of possession of the suit property having been delivered to him. According to Defendant, the

Plaintiff is signatory even to this document executed in favour of Ajitkumar Surpuriya. In other words, it is the case of the Applicant/Defendant that Ajitkumar Surpuriya became the owner and occupant of the suit property in his own rights to the knowledge of the Plaintiff. The Defendant has also relied on the City Survey records to indicate that the name of said Ajitkumar Surpuriya has been entered in the records as owner and occupier of the property. The Defendant has also relied on the electric connection secured from Maharashtra State Electricity Board in the suit premises by the said Ajitkumar Surpuriya. The case of the Defendant is that the said Ajitkumar Surpuriya, in turn, has sold and transferred the suit property in favour of the Defendant by a registered Sale Deed dated 21st February 1997 and handed over possession of the suit property to the Applicant/Defendant on that date and from which date, the Defendant is enjoying lawful and peaceful possession of the suit property. The Defendant has also referred to the fact not disclosed by the Plaintiff that Plaintiff had filed Suit against Mr.Surpuriya being RCS No.120 of 1996 on 7th

February 1996 seeking declaration that the Sale Deed between him (Ajitkumar Surpuriya) and Parvatibai Godane was illegal and void. In the said Suit, the Plaintiff also claimed relief against Surpuriya that he may be restrained from obstructing possession of the suit property which was with Plaintiff. Interestingly, no prayer for specific performance of the unregistered Agreement executed in favour of the Plaintiff dated 19th September 1994 by Smt.Parvatibai Godane was claimed in this Suit. Moreover, this Suit being RCS No.120 of 1996 came to be unconditionally withdrawn by the Plaintiff on 26th February 1996. This had happened much before the registered Sale Deed was executed in favour of the Applicant/Defendant by said Ajitkumar Surpuriya. Notwithstanding the institution and withdrawal of the Suit being RCS No.120 of 1996 by the Plaintiff, the Plaintiff claimed that Sale Deed has been executed in favour of Plaintiff by Smt.Parvatibai Godane on 18th February 1997, after Godane had given notice to Ajitkumar Surpuriya on 18th February 1997, cancelling the registered Agreement of Sale operating in his (Surpuriya's) favour dated 11th

October 1995. In the first place, the purported Sale Deed in favour of the Plaintiff dated 18th February 1997 executed by Smt.Godane in respect of the suit property is an unregistered Deed. Besides, Smt.Godane had not taken steps to seek declaration from the Competent Court that the registered Sale Deed in favour of Ajitkumar Surpuriya dated 11th October 1995 was void, invalid or not binding on her. So long as the said registered Sale Deed dated 11th October 1995 operated in favour of Ajitkumar Surpuriya, Smt.Parvatibai Godane had no right to deal with the property or to execute Sale Deed in favour of the Plaintiff as was done on 18th February 1997. After the registered Sale Deed was executed in favour of Surpuriya by Smt.Godane, to which Plaintiff was signatory, the Plaintiff had instituted Suit against Surpuriya and Godane being RCS No.120 of 1996, which was, however, withdrawn unconditionally as referred to above. However, after the registered Sale Deed was executed in favour of the Defendant by Surpuriya on 21st February 1997, Plaintiff instituted another Suit against Surpuriya, for injunction on 26th February 1997

being RCS No.96 of 1997. This Suit also came to be withdrawn unconditionally on 20th June 1997 by the Plaintiff.

5. On the basis of the above factual matrix, it is asserted on behalf of the Defendant that the Plaintiff had no causal connection with regard to the suit property on or after 7th July 1995 after the Agreement was executed by him in favour of Smt.Parvatibai Godane. Moreover, Parvatibai Godane having entered into registered Sale Deed in favour of Ajitkumar Surpuriya on 11th October 1995, who in turn, has conveyed the suit property in favour of the Defendant by registered Sale Deed on 21st February 1997, the Defendant was in lawful possession of the suit property as owner thereof. The Defendant, in addition, relied on the documents such as Shop Act licence, photographs, electricity bill, property tax receipt, etc. which indicate that the suit property was transferred in favour of Ajitkumar Surpuriya and he was in peaceful and lawful possession and enjoyment thereof, who in turn legitimately put the Applicant/Defendant in possession of the suit property. Both sides also

relied on oral evidence in support of their respective claim.

6. The Trial Court by the impugned Judgment and Order proceeded to decree the Suit in favour of the Respondent/Plaintiff and directed the Applicant/Defendant to hand over vacant and peaceful possession of the suit property to the Plaintiff within thirty days from the date of the decree.

7. Before I proceed to consider the rival submissions, I will advert to the reasoning and the approach adopted by the Trial Court in decreeing the Suit in favour of the Respondent/Plaintiff. The Trial Court was conscious of the fact that in a Suit of the kind under Section 6 of the Act, the Court was not concerned with the issue of title but the enquiry was required to be restricted to the factum of forcible dispossession of the Plaintiff within six months preceding the institution of the Suit as asserted by the Plaintiff. In other words, the Trial Court was fully conscious of the fact that the scope of enquiry was necessarily with

regard to-as to which party was in possession of the suit property at the relevant time and whether the Plaintiff has been forcibly dispossessed from the suit property within six months preceding the date of institution of the subject suit. To that extent, no fault can be found with the Trial Court. The Trial Court, to answer this issue, however, has analysed the matter by first referring to the claim of the Plaintiff that he had come in possession of the suit property after execution of the Agreement by Godane in his favour on 19th September 1994. Further, after coming into possession, Plaintiff had carried out repairs in the suit property and thereafter started to reside therein. To support this position, Plaintiff has relied on documentary evidence such as Shop Act licence, photographs, etc. and also oral evidence. After referring to the said claim of the Plaintiff, the Trial Court straightaway proceeded to analyse the case of Defendant as also the evidence produced by the Defendant. The discussion regarding such analysis done can be discerned from Paragraph 12 onwards of the impugned Judgement. The Trial Court has noted that the Defendant is not disputing the existence

of Agreement dated 19th September 1994 in favour of the Plaintiff executed by Godane with regard to the suit property. It then noted that the Defendant was not disputing the fact that the Plaintiff was put in possession of the suit property upon execution of the said Agreement dated 19th September 1994. The Trial Court has then noted that although the Defendant was disputing the claim of the Plaintiff that after entering possession, Plaintiff undertook repairs and started running business and also used the suit property for residence, that challenge will have to be negated relying on the admissions of the Defendant. The Trial Court has then straightaway proceeded to analyse the evidence of power of attorney holder of Defendant Jaiprakash Bharadiya (DW 1). On analysing his evidence, the Trial Court proceeded to hold that DW 1 has not seen who had made construction and repairs in the suit property. Further, DW 1 does not know whether any notice was sent by Godane to Surpuriya on 18th February 1997 cancelling the registered Sale Deed between them with regard to the suit property. Further, DW 1 was not aware that the transaction between Godane

and Ajitkumar Surpuriya was not a sale but security transaction against loan. It is then noted that DW 1 admits possession of the Plaintiff in respect of the suit property by virtue of Agreement for Sale. The Trial Court has then found that DW 1 has not stated that Surpuriya was put in possession. After analysing the evidence of DW 1, the Trial Court proceeded to analyse the evidence of another witness Ajitkumar Surpuriya. Upon analysing his evidence, the Trial Court proceeded to hold that this witness is unable to state on which date Plaintiff handed over possession as contended by the Defendant (as noted in Agreement dated 7th July 1995 signed by the Plaintiff). The Trial Court then referred to evidence of Bogawat (DW 3). His evidence has been discarded as evidence of interested person on the reasoning that he had no reason to depose before the Court without summons issued to him. In substance, it is found that this witness was obliging Surpuriya. The Defendant had examined this witness as he was signatory to the registered Sale Deed executed by Surpuriya. Be that as it may, after discarding the version of Bogawat (DW 3), the Trial Court referred to the

submissions of the Advocate for the Defendant. The Trial Court discarded Agreement dated 7th July 1995 executed between Plaintiff and Godane on the reasoning that the same is not proved in strict sense. It has observed so, as, in the earlier part of the order, it had discarded evidence of Bogawat (DW 3), who was attesting witness to the said document. Other reasons are also recorded for discarding the said document. Amongst others, the manner in which the stamp paper was procured and that it did not bear the signature of Plaintiff but one Sarname. The stamp paper was purchased in the name of resident of Kurkambh and not of the executant who was resident of Barshi. Moreover, failure of the Applicant/Defendant to examine Parvatibai Godane is also noted as one other reason. Essentially, the Court has discarded Agreement dated 7th July 1995 between Plaintiff and Godane, which answers the fact that Plaintiff had handed over possession of the suit property to Godane. It has observed that it was unsafe to rely on the evidence of Bogawat (DW 3). After so observing, the Trial Court addressed itself to the request of the Defendant to compare the signature

of Plaintiff appearing on the documents relied by the Defendant whether the Plaintiff himself was the signatory. That request has been rejected on the reasoning that no formal application was made requiring the Plaintiff to give admitted signature to be sent for comparison to an expert. The Court has noted that under Section 73 of the Evidence Act, it was empowered to compare the disputed signature with admitted signature of Plaintiff available on record, but declined to do so, as there was no formal request and such request came only during written arguments. On that reasoning, the argument of the Defendant that the Plaintiff was signatory to documents relied by the Defendant including to the registered Sale Deed came to be discarded. The Trial Court then referred to one more circumstance that Surpuriya had not disputed that he had received legal notice dated 18th February 1997 (Exhibit 157) from Plaintiff about transaction between him and Godane. That legal notice was duly served on Surpuriya which fact was proved by postal acknowledgement (Exhibit 158). In spite of that, Surpuriya hastened the action of transferring the suit property in favour of the

Defendant by registered Sale Deed on 21st February 1997 without even bothering to send reply to the legal notice. The Court has held that this conduct of Surpuriya speaks volumes about the nature of transaction between Surpuriya and Godane. The Court then observed that all these aspects created doubt in its mind regarding the fact that Surpuriya had in fact received possession of the suit property from the Plaintiff or from Godane. On that reasoning, the Court proceeded to hold that on the day of Agreement in favour of Surpuriya, who in turn, has conveyed the suit property in favour of the Defendant, the suit property was in possession of the Plaintiff by virtue of Agreement for Sale dated 19th September 1994 till his dispossession on 1st March 1997. The Trial Court in the latter paragraph (Para 16) proceeded to hold that as the power of attorney holder of Defendant accepts in his evidence that he did not know who made repairs in the suit premises, relying on the provisions of Order VIII Rule 5 of the Code and Section 58 of the Indian Evidence Act, 1872, it proceeded to hold that the power of attorney holder of the Defendant has admitted that Plaintiff was put in possession

over the suit property. It has then found that Surpuriya failed to establish from the receipt the fact of possession given to Godane.

8. Interestingly, the Trial Court has adverted to the fact that parties had produced evidence in the form of photograph, electricity bills, receipts to establish their claim of possession during the relevant period. However, the Trial Court has not considered the efficacy of those documents on the reasoning that they were not so convincing to attach right to either party with regard to the suit property. It then observed that the possession of Plaintiff from Godane is not in dispute and Godane was the best person to state about the possession of Surpuriya. But as the Defendant failed to examine Godane, the issue will have to be answered against the Defendant. It has then observed that the only probability that can be accepted is the case of the Plaintiff that forcible possession of the suit property was taken from the Plaintiff by the Defendant. While dealing with issue No.2 as to whether the Plaintiff proves that Defendant dispossessed him from the suit property,

it has noted in Paragraph 17 that the Defendant failed to establish that she had received possession of the suit property from Surpuriya. It has observed that, Surpuriya was not put in possession of the suit property inspite of Sale Deed executed by Godane in his favour; that Agreement dated 7th July 1995 executed between Plaintiff and Godane has not been proved; that the document of Sale in favour of Surpuriya does not mention that he received possession from the Plaintiff. On this reasoning, the issues were answered against the Defendant and in favour of the Plaintiff by the Trial Court and as a consequence, the Suit was decreed in favour of the Plaintiff.

9. I have purposely analysed the approach and reasoning adopted by the Trial Court in extenso. For the nature of order that I propose to pass, I think it appropriate to avoid recording opinion on the correctness or otherwise of the findings or reasons noted by the Trial Court in the impugned Judgment one way or the other. This is so because, I am inclined to set-aside the impugned Judgment

and relegate the parties before the Trial Court for reconsidering the case afresh on its own merits in accordance with law, as I am convinced that the approach of the Trial Court is manifestly wrong. I am avoiding to record my views regarding the correctness of the reasons and findings noted by the Trial Court one way or the other, so that, the Trial Court will not be influenced by any observation in this Order, or for that matter, the impugned Judgment.

10. Indeed, the learned Judge was right in observing that the core issue required to be considered was, as to which party was in possession of the suit property at the relevant time and whether the Plaintiff had proved that the Defendant forcibly dispossessed him from the suit property. These were the core issues relevant for deciding the suit under Section 6 of the Act. To examine these aspects, the Trial Court was expected to first analyse the pleadings and evidence-documentary and oral- produced by the Plaintiff during the trial. However, all that the Trial Court has done is only referred broadly to

the claim of the Plaintiff and straightaway proceeded to analyse the evidence produced by the Defendant. The Trial Court has clearly overlooked that the initial onus of proving the fact that the Plaintiff was in possession of the suit property all throughout, was on the Plaintiff. For that, the Trial Court should have analysed the pleadings and evidence of the Plaintiff both - documentary and oral. The documentary evidence such as photographs, electricity bills, receipts, etc. produced by the parties have been discarded by the Trial Court on the specious reasoning that the same were not so convincing to attach right to either party with regard to the suit property. In my view, this is not the correct approach. The Trial Court was obliged to first advert to the pleadings of the Plaintiff regarding the factum of possession at the relevant time and analyse the Plaintiff's evidence (both documentary and oral) to establish that fact. The Plaintiff cannot succeed on account of the weakness in the Defendant's evidence, but the initial burden of proving his possession at the relevant time is on the Plaintiff himself. There is no such clear finding recorded by the Trial

Court in favour of the Plaintiff. The Trial Court has also not adverted to the grievance of the Defendant that the Plaintiff had failed to disclose or suppressed material facts such as filing and withdrawal of two earlier Suits with regard to the suit property.

11. Be that as it may, the Trial Court has not made any attempt to analyse the efficacy of the documentary evidence produced by both the sides. In fact, when the contemporaneous evidence produced by both sides was of same kind and confronted the case of the other side on the material issue, the Trial Court was obliged to analyse the same and accept the case of one side if substantiated by the party by documents. This is so, as in the present case, the Defendant had also produced documentary evidence for the relevant period such as photographs, Shop Act Licence, property tax receipts, city survey records, electricity bills, receipts, etc. to establish the factum of possession at the relevant time, which documents have not been analysed at all. Those documents pertain to period anterior to 1st March 1997. The

efficacy of the documents produced by the parties for the same purpose ought to have been weighed by the Court to reach at the conclusion as to who was in fact in possession during the relevant period. That analysis has not been done at all by the Trial Court.

12. Moreover, the Trial Court has negatived the request of the Defendant to compare the disputed signatures of the Plaintiff with the admitted signature of the Plaintiff available on the Plaint and Vakalatnama, in exercise of power under Section 73 of the Indian Evidence Act, taking hypertechnical view that no formal application was made by the party in that behalf. It is well established position that to reach at a just and correct decision, it is the bounden duty of the Court to exercise the enabling power such as under Section 73 of the Indian Evidence Act to compare the disputed and admitted signatures available from the record. Merely because no formal application was made in earlier point of time by the Defendant, could not be a just reason to abjure from exercising such power which would have otherwise

facilitated in clinching the issue. This is so because, the case of the Defendant is that the Plaintiff himself was signatory to the documents including registered Sale Deed relied upon by the Defendant. The Plaintiff, however, has disputed his signature on the said document; whereas, on comparing the disputed signature with the admitted signature of the Plaintiff available from the record namely the Plaint and Vakalatnama, the Court could have drawn some inference about the correctness of the stand taken by the parties. If the Court were to hold that the signatures appearing on the documents pressed into service by the Defendant were that of Plaintiff, the case made out by the Plaintiff would become doubtful. Moreover, the Plaintiff was placing reliance on documents amongst others, unregistered Agreements. Admittedly, there is no challenge to the registered Agreements executed in favour of the Defendant either by the Plaintiff or the original owner. If it is held that signature of Plaintiff appears on the registered Agreements relied upon by the Defendant, in that case, the scale will tilt in favour of the Defendant as the Plaintiff will be

bound with the claim of the Defendant about possession of the suit property delivered legitimately. I am not myself analysing all these aspects, as it is better left to be considered by the Trial Court in the first instance on appreciation of evidence in that behalf and in accordance with law.

13. There are other issues which will have to be addressed by the Trial Court and the evidence adduced by both the parties will have to be weighed in proper perspective. Whether the documents pressed into service by the parties have been duly proved in evidence or not are also issues that will have to be properly addressed. If the documents have been duly proved, from the contents thereof, certain inferences can be drawn.

14. Suffice it to observe that the appropriate course in the fact situation of the present case is to set-aside the impugned Judgment and Order without expressing any opinion on the merits of the contention of the parties in any manner. All questions will have to be reexamined by the Trial

Court on its own merits in accordance with law uninfluenced by the observations in the impugned Judgment in any manner or for that matter, in this order. In other words, the Trial Court will reconsider the materials on record *de novo* on its own merits in accordance with law.

15. It will be open to the Trial Court to offer opportunity to the parties to adduce further evidence, if they so desire. I am making this observation as the parties have been relegated before the Trial Court for reconsideration of the case afresh from the stage before Judgment.

16. During the course of arguments, Counsel for the Respondent/Plaintiff had relied on the decisions of the Supreme Court regarding the scope of interference under Section 115 of the Code. Reliance was placed on the decisions reported in (2004) 4 SCC 664 - Sanjay Kumar Pandey & Ors. v. Gulbahar Sheikh & Ors., (1998) 7 SCC 383 - Patel Valmik Himatlal & Ors. v. Patel Mohanlal Muljibhai, 1991 Supp. (2) SCC 270 - Masjid Kacha Tank, Nahan v. Tuffail Mohammed. Reliance was

also placed on the decisions about the scope of enquiry in suit under Section 6 of the Act reported in (1995) 3 SCC 426 - **Nagar Palika, Jind v. Jagat Singh, Advocate and (1974) 1 SCC 48 - M.C.Chockalingam & Ors. v. V.Manickavasagam & Ors.** Reliance was also placed on the decisions of the Supreme Court reported in 2003 (8) SCC 745 - **Narbada Devi Gupta v. Birendra Kumar Jaiswal & Anr.** to contend that merely because the document is accepted during the trial, that is not enough.

17. In my opinion, it is not necessary to burden this order with the exposition in those cases, except to observe that in the fact situation of the present case, this Court is obliged to correct the manifest error committed by the Trial Court in deciding the case on the basis of probabilities and presumptions and also because of non-consideration of evidence on record. If any authority is required on this proposition, the Applicant has rightly relied on the decision in the case of **Madhubir Prasad Jain v. Ganga Singh** reported in (1999) 8 SCC 274. In that decision, after noting the error committed by the High Court

in not interfering in exercise of revisional jurisdiction, the Apex Court went on to consider the entire matter afresh on its own. Indeed, that course also is available, however, in my opinion, this Court will have the advantage of a reasoned Judgment and findings on facts of the Trial Court which would have analysed the relevant pleadings and other materials on record in the form of oral and documentary evidence relied by the parties. The efficacy of such material will have to be analysed and weighed by the Trial Court in the first place.

18. Accordingly, the present Revision Application succeeds. The impugned Judgment and decree is set-aside and instead, the parties are relegated before the Trial Court for reconsideration of the case *de novo* from the stage before Judgment on its own merits in accordance with law. The Trial Court may permit the parties to produce further evidence as may be advised and permissible by law. In other words, the matter is sent back to the Trial Court to be decided from the stage before Judgment in accordance with law.

19. It is once again made clear that the Trial Court shall analyse the pleadings and evidence on record afresh and come to independent conclusion without being influenced by any of the observations made in the impugned Judgment or for that matter, the present Order.

20. The parties shall appear before the Trial Court on 15th November 2006 at 11.00 a.m., on which date, the Trial Court shall pass appropriate order assigning next date of hearing, as may be advised. The Trial Court shall dispose of the proceedings as early as possible preferably by end of January 2007. R & P be returned to the Trial Court forthwith, if necessary, by deputing special messenger.

21. Revision Application disposed of on the above terms.

A.M.KHANWILKAR, J.